NO. 49259-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

ROBERT ERNEST VESTRE,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK McCAULEY, JUDGE

RESPONSE TO SUPPLEMENTAL BRIEF OF APPELLANT

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RESPONSE TO SUPPEMENTAL ASSIGNMENT OF ERROR

1. The Defendant was not entitled to a "*Petrich* Instruction" because the acts involved the same parties, location, and ultimate purpose, and was therefore a continuous course of conduct. To the extent that the Defendant was so entitled, this issue is not a "manifest" error, and so cannot be raised for the first time on review.

FACTS PERTAINING TO THE SUPPLEMENTAL ASSIGNMENT OF ERROR

Crista Arends testified that around June 14th or 15th she was at the Grays Harbor Historical Seaport Authority building to strip wire. VRP at 170. She said that she had been there the day before to do the same thing. VRP at 174. Ms. Arends explained that she and her daughter first entered the building, then called the Defendant and Christine Ortiz. VRP at 197. She testified that she and her daughter had first discovered the building around the 13th or 14th, and that she had been awake for many days and was unsure of the exact dates. VRP at 175.

Ms. Arends testified that the first entry to the building was the day before she was arrested in South Bend. VRP at 197. This had previously been established as Monday, June 15th, 2015 at about 9-10 a.m. VRP at 62. Ms. Arends told the jury that after the first entry they loaded her truck up with wire and took it back to Maple Valley. VRP at 197-98. After she

and the Defendant and Christina and Sarah stripped the wire, they decided to go back for more. VRP at 200. Ms. Arends said that when they got back to the Seaport Authority's building they "did the same work." VRP at 201. Ms. Arends then explained they went straight to South Bend. *Id*.

Shawn Cross, the former facilities manager at the Grays Harbor Historical Seaport Authority testified that when he arrived at the facility on June 15th, he found the wiring ripped out of the walls with a forklift. VRP at 54. Mr. Cross testified that he had last checked the place on Thursday or Friday the week before. VRP at 55.

The Defendant did not request a unanimity instruction, or object to the court not giving one. *See* VRP at 223-39.

ARGUMENT

1. The two burglaries were a continuing course of conduct, so no unanimity instruction was called for.

The Defendant, in his supplemental brief, claims that, because the evidence adduced at trial indicated that there were two burglaries at the Grays Harbor Historical Seaport in which he was involved, he was entitled to a unanimity instruction. However, because the both burglaries were at the same building, occurred within the same time frame, and for the same purpose, they constitute a continuous course of conduct, and a unanimity instruction is not required.

Continuing course of conduct.

A "*Petrich*" or unanimity instruction is not required in all cases where there are multiple acts which could support the charge. "[A] continuing course of conduct may form the basis of one charge in an information." *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173, 177 (1984), *holding modified by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). Where the State presents evidence of multiple acts that constitute a "continuing course of conduct," no election or unanimity instruction is required. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

To determine whether criminal conduct constitutes but one continuing act, the court reviews the facts in a commonsense manner. *State v. Fiallo–Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). "To determine whether there is a continuing course of conduct, we evaluate the facts in a commonsense manner considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose." *State v. Brown*, 159 Wn. App. 1, 14, 248 P.3d 518, 524 (2010) (*citing State v. Love*, 80 Wash.App. 357, 361, 908 P.2d 395 (1996).)

In *State v. Camarillo* "The defendant was charged with one count of indecent liberties based on the three events." *Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850, 855 (1990). "The incidents testified to… occurred between June 4, 1981 and July 10, 1982." *Id*. "On appeal the defendant claimed he was denied a fair trial because the State failed to elect which act of three incidents it was relying upon." *Id*. at 62. The Washington Supreme Court upheld the conviction, holding that there was "…no factual difference between the incidents." *Id*. at 70.

In *State v. Knutz*, the defendant assigned error to the trial court's failure to give a unanimity instruction for a charge of Theft in the First Degree committed by multiple acts over the course of three years. *Knutz*,

161 Wn. App. 395, 406, 253 P.3d 437, 442 (2011). This court affirmed the conviction, adopting the reasoning of *State v. Barrington*, 52 Wash.App. 478, 481, 761 P.2d 632 (1988), that the defendant had a single object – to obtain money by deceit.

In the instant case the Defendant's actions involved the same parties – the burglars and the Grays Harbor Historical Seaport Authority. The crimes happened at the same location; the Seaport's Junction City building. And the crimes had the same purpose – to steal metal which could be sold for money. The only difference is that the two incidents were separated by a pause of unknown duration, probably a span of several hours, but less than a day, during which the Defendant and his accomplices took their loot to Maple Valley to prepare it for sale.

Because the two incidents were the same course on conduct, the Defendant was not entitled to a "*Petrich*" or unanimity instruction. This court should uphold his conviction.

Any error was not manifest.

The Defendant concedes that his trial counsel did not request a unanimity instruction. *See* Supplemental Brief of Appellant at 4. It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not

first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177, 1180 (2013). The State anticipates that the Defendant may argue that this error constituted manifest error, which may be reviewed despite the failure to preserve the issue for appeal. *See* RAP 2.5(a)(3). However, "The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review." *State v. Kirkman*, 159 Wn.2d 918, 926–27, 155 P.3d 125, 130 (2007) (*citing State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995).)

In the instant case had the Defendant requested a unanimity instruction, the State could have amended the Information and alleged a second count for Burglary in the Second Degree instead. Given that the Defendant's offender score at sentencing was calculated at ten for Count 1 and eight for Counts 2 and 3, a second count would have elevated the Defendant's offender score to 12. Clerk's Papers at 92. Although this would not have elevated his standard range on Count 1,[1] for that same reason such a conviction would have invoked the "free crimes"

[1] *See* RCW 9.94A.510.

aggravating circumstance of RCW 9.94A.535(2)(c), subjecting the Defendant to an exceptional sentence.

The Defendant was not prejudiced by the lack of a unanimity instruction. Rather, it appears he benefitted from it. Therefore, the error is not "manifest" and to the extent any error was committed, this court should decline to review it.

CONCLUSION

The Defendant (and his co-defendants) committed two burglaries within the course of a short amount of time, perhaps as long as a day. They paused between the two incidents only long enough to transport and unload their booty, prep it for sale, only to turn around to do the same thing some more. This all occurred over a weekend, and, when it was discovered, there was no way for Mr. Cross or the investigating officers to know that the destruction had been the product of two, rather than one, episodes of illegal entry. Only the testimony of Christa Arends makes that distinction.

It is not a distinction that makes any difference to the Defendant's constitutional rights. He actually benefits from the murkiness of the events that he participated in. Under the rules clearly expressed in *Petrich*

and its progeny, continuing courses of conduct, such as in the instant case, do not give rise for a unanimity instruction. The conviction should be affirmed.

DATED this _1st__ day of August, 2017.

Respectfully Submitted,

BY: _____
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JFW / jfw

GRAYS HARBOR PROSECUTING ATTORNEY

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